NO. 41820-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NANOKA KRUGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00520-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED December 29, 2011, Port Orchard, WA
Original filed electronically with the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Kruger preserved her claim that ER 404(b) evidence was improperly admitted where she did not object to the evidence in question at trial, and where, in any event, the evidence did not consist of any prior act, but instead clarified testimony that Kruger herself had offered?

2. Whether Kruger fails to show her counsel was ineffective for not proposing an ER 404(b) limiting instruction where, as noted, no ER 404(b) evidence was admitted?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Nanoka Kruger was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 15. She was convicted as charged by a jury. CP 48.

B. FACTS

Kitsap County Sheriff's Deputies Benjamin Herrin and Troy Graunke were dispatched in response to a report of a woman smashing the windows of a car with a crowbar. RP 20, 41.[1] Herrin arrived first at the scene and found Kruger, who matched the description of the woman reported by the caller, in the middle of the street. RP 20-21, 41. She was frantically pacing back and

[1] "RP" refers to the report of proceedings of the trial, occurring on December 27-28, 2010.

forth and yelling. RP 22, 42. Herrin identified himself as a deputy and asked her to come toward him, and to keep her hands visible. RP 22-23, 42. She continued to rant and rave and then put her hands behind her head and backed away. RP 22-23.

Meanwhile, Deputy Graunke arrived at the scene. Herrin continued to instruct Kruger to come toward them and to keep her hands visible. RP 23, 41, 43. Because she did not comply, they approached her. RP 24, 41, 43. They continued to identify themselves as they approached and were able to handcuff her without further incident. RP 24, 44. She continued to ramble on about unrelated stuff as they approached. RP 24.

After she was cuffed, they patted her down for weapons, for safety reasons. RP 25. She stated that she was afraid of law enforcement, and was not sure who they were. RP 25. They had had their blue lights on and had repeatedly identified themselves. RP 42. They had not issued any threats. RP 43. Based on their training and experience it appeared to the deputies that Kruger could be under the influence of narcotics. RP 26, 42.

During the pat-down, Herrin asked her if she had anything on her person that could cause an officer safety issue. RP 45. Kruger reached around, despite being handcuffed, and dug her fingers into her front pocket. RP 26, 45. Herrin told her to stop, and she pulled her hand out. RP 26, 45.

As she pulled her hand out, a baggie came out with it and fell to the ground. RP 26-27, 46, 49.

The baggie contained a small amount of white crystalline substance that resembled, and was later positively identified as, methamphetamine. RP 27, 46, 59. After reading Kruger her rights, Herrin asked her about the drugs, but her ranting responses were not responsive to his questions. RP 28. They later determined that the windows had been smashed out of a car at the scene. RP 28. It was Kruger's own car. RP 29, 52.

Kruger testified that she was having "a large emotional outburst" when she was arrested. RP 63. She had been arguing with her boyfriend over the titles to her cars. RP 65. She was in the middle of the road and yelling when the police arrived. RP 67.

She did not respond appropriately even after she realized Herrin was an officer (shortly before Graunke arrived) because she was still upset from being intimidated by her boyfriend. RP 69. She did not want to turn toward the officers because she was trying to watch the boyfriend who had thrown a rock at her. RP 69. She also had had "a previous experience with police officers that made [her] nervous as far as [her] safety went." She did not, however, believe they were there to harm her. RP 69.

She also maintained that there was a "profound amount" of drug activity in the neighborhood. RP 73. She attributed the meth the deputies recovered to that. RP 73, 82.

III. ARGUMENT

A. KRUGER DID NOT PRESERVE HER CLAIM THAT ER 404(B) EVIDENCE WAS IMPROPERLY ADMITTED WHERE SHE DID NOT OBJECT TO THE EVIDENCE IN QUESTION AT TRIAL, AND WHERE, IN ANY EVENT, THE EVIDENCE DID NOT CONSIST OF ANY PRIOR ACT, BUT INSTEAD CLARIFIED TESTIMONY THAT KRUGER HERSELF HAD OFFERED.

Kruger argues that trial court erred allowing the State to question her with regard to her prior contacts with law enforcement. This claim is without merit because it was not preserved for review by an appropriate objection. Moreover, even were it properly before this Court, the State did not "disclose her prior encounters with law enforcement." Brief of Appellant, at 7. To the contrary Kruger disclosed the prior contact and the State only briefly inquired as to when that had occurred. The questioning was relevant in the context of the case and was not emphasized in any way.

1. Kruger has not preserved the issue for review.

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court

jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (*citing State v. Scott,* 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, moreover, that "'the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.'" *Id.* (*quoting Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is "'manifest,' i.e., whether the error had 'practical and identifiable consequences in the trial of the case."' *Id.* (*quoting State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

Questions of the admissibility of evidence are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). A party may only assign error in the appellate court on the *specific ground* of the evidentiary objection made at trial. *State v. Guloy*, 104

Wn.2d 412, 422, 705 P.2d 1182 (1985).

Kruger now argues that the trial court violated ER 404(b) and associated case law when it allowed the State to ask Kruger when her prior bad experience with law enforcement occurred. However, the record shows that this contention was not raised at trial.

The deputies testified that when they arrived at the scene, Kruger was in the middle of the road and ranting. When they asked her to approach them, she repeatedly ignored their commands. An inference that could be drawn was that Kruger was reluctant to approach them because she had methamphetamine in her pocket.

Kruger clearly recognized the inference. In her trial testimony Kruger asserted that one of the reasons she did not respond to the deputies' commands was that she was scared because she had had "a previous experience with police officers that made [her] nervous as far as [her] safety went." RP 69. On cross-examination the State briefly explored that testimony:

> Q Prior to this day, you said that you had a bad experience once with law enforcement.
>
> A Yes.
>
> Q When was that?□ How long ago?
>
> A Urn---
>
> MR. KELLY:□ Your Honor,□ I am going to object to

the inquiry in this area.

THE COURT: Let's have a brief side bar.

(Side bar conference.)

Q (By Ms. Foster) How long ago was this bad experience?

A From now or from the date of the incident?

Q From the date of the incident, from 2010. Was it years ago?

A No.

Q It wasn't years ago.

A No.

Q It had been recent.

A It probably had been within the last two years of the incident, when my initial contact with the officer, and --

Q Did you have -- Were these officers the ones that were involved in your bad experience?

A No. No.

Q Did you tell these officers that you had a bad experience and you were afraid?

A At that time I just related to them, because they were distant from me, that I was afraid, and I was afraid.

RP 86-88. At the conclusion of the testimony, the sidebar discussion was placed on the record:

> THE COURT: First I would like to make a record of the side bar that I called during the course in Ms. Kruger's testimony. It had to do with how far the state would be able to get into involved with Ms. Kruger's bad experiences with the police. Mr. Kelly was concerned as to the number of those and whether or not it might lead to her arrest for the DUI. Ms. Foster indicated that the door had been opened because she indicated she had -- Ms. Kruger had been afraid of the police based upon prior experience. I limited it to the one prior experience in terms of the inquiry.

Is that a fair statement of the side bar that occurred?

MS. FOSTER: Yes, Your Honor.

MR. KELLY: Yes, Your Honor.

RP 107-08.

Clearly the only objections below were to questioning Kruger about her prior DUI, and the revelation of multiple prior encounters with the police. *See also*, CP 25 (Defendant's Motion in Limine No. 1).[2] Those objections were sustained as to their substance, and the State complied with the trial court's ruling on the objection. Kruger should not now be heard to complain on appeal.

2. *The trial court properly allowed the State to briefly question Kruger about her "prior bad experience" with the police after she raised the issue.*

Even if the Court were to consider the issue, it is without merit.

To read Kruger's primary argument, one might conclude that out of the blue, the State laid before the jury Kruger's prior criminal history. Nothing of the sort occurred, however. As already noted, it was Kruger that raised the issue of her prior contact with the police. The State merely asked a few brief, relevant, questions about when the prior experience occurred, whether it involved the deputies in the instant case, and whether she had told

[2] "That no State's witness be allowed to testify that the Defendant has previously been convicted on Reckless Driving in 2010 and/or Negligent Driving in 2007. ER 609, ER 404(b)."

the deputies why she was scared. The State did not elicit the nature of the prior contact, or in any way imply that Kruger had been involved in unlawful or improper conduct at the time. As such none of the cases cited by Kruger in her brief are on point.

Kruger commences her argument with the assertion that the trial court must begin with the presumption that evidence of prior bad acts is inadmissible. This claim begs the question of what evidence of a prior bad act the State elicited.

ER 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

The State simply did not elicit any evidence of any prior act to show Kruger's character, or that she acted in conformity with it. Indeed it elicited no testimony of any prior act at all. It simply asked her when her alleged prior bad experience with law enforcement had occurred and whether it had involved the deputies involved in the present case. In neither its questioning nor its argument did the State imply that Kruger had acted unlawfully or improperly during that bad experience. Indeed, the circumstances of the prior experience were not raised nor asked about. Kruger fails to show that any evidence calling ER 404(b) into play was admitted at her trial.

Moreover, the evidence was relevant. A reasonable inference from the evidence introduced in the State's case was that one of the reasons Kruger did not want to approach the deputies was that she had methamphetamine in her pocket. Recognizing this fact, Kruger offered several explanations for her failure to comply with the deputies' request for her to approach them: that she was afraid of being jumped by her boyfriend; that she did not initially realize that Herrin was a deputy; and that she was scared due to prior negative contact with law enforcement. RP 69. How long ago the prior contact occurred, whether it involved the deputies, and whether she told the deputies why she was scared would have an impact on the validity of her assertions.[3] The evidence was therefore relevant.

Finally, any error would be harmless. The erroneous admission of evidence is not of constitutional magnitude. Therefore, the rule is that the alleged error would not be prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

Here, the topic was initially broached on the defense's direct examination of Kruger. The cross-examination was limited to brief questioning regarding when the prior "experience" had occurred, whether it

[3] Notably, the State also cross-examined her, without objection, about these other excuses as well. RP 85-86, 88-91.

involved the two deputies in this case, and whether she had told them that was why she was afraid. The questioning consumed barely a page of transcript out of 15 pages devoted to Kruger's cross-examination.

Finally, the topic was not dwelt upon in the State's closing. That argument consumed 11 pages of transcript. RP 126-37. The State made only two brief references to the issue. Even then, its comments were confined to the evidence *Kruger* elicited, and the purposes for which she elicited it. The first passage was part of a request that the jury not be swayed by sympathy:

> She attempted to give you all a very sympathetic story. She had a bad day, was having trouble with a boyfriend she had had trouble with before. She had prior bad experiences with law enforcement. Very sympathetic.

RP 127. The second comment was, again, directed to *Kruger's* testimony, and was in the context of her explanations for her behavior:

> Now, the defendant has testified that she has had a bad experience with law enforcement, she was afraid, but she wasn't really clear about what she was afraid of, whether it was the boyfriend, who no one knew where he was and she didn't tell the police where he was, or whether it was law enforcement, but she also testified that she didn't know it was law enforcement, so that's why she didn't comply with their commands, only to change that story and say, once they identified themselves as law enforcement, shortly before Deputy Graunke even got on the scene where they identified themselves again according to Deputy Herrin and Deputy Graunke, she knew they were law enforcement. She knew. And she testified that she didn't believe they were out to harm her.

RP 128-29. The issue was not mentioned at all in the State's rebuttal. RP 147-51. Clearly, if any error occurred in allowing the State's three brief questions about Kruger's self-described "previous experience," its exclusion would not have materially affected the outcome of the trial. This claim should be rejected.

B. KRUGER FAILS TO SHOW HER COUNSEL WAS INEFFECTIVE FOR NOT PROPOSING AN ER 404(B) LIMITING INSTRUCTION WHERE, AS NOTED, NO ER 404(B) EVIDENCE WAS ADMITTED.

Kruger next claims that trial counsel was ineffective for not proposing an ER 404(b) limiting instruction. This claim is without merit because, as noted, no ER 404(b) evidence was admitted.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The decision not to obtain a limiting instruction can be a legitimate trial tactic because such an instruction may simply underscore the damaging evidence. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) ("We can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence."); *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011) ("We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence.").

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Judicial scrutiny of a defense attorney's performance must be "highly deferential" in order to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court will defer to counsel's strategic decision to present or forego a particular defense theory when the decision falls within the wide range of professionally competent assistance. *United States v. Layton*, 855 F.2d 1388, 1420 (9th Cir.1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883. As will be seen, Kruger fails to meet either prong of the test, and her claim should be rejected.

Kruger fails to show deficient performance. As discussed previously, no ER 404(b) evidence was offered by the State. As such there was no basis to propose a limiting instruction. Moreover, counsel did not object to the evidence the State did elicit. This is no doubt due to the fact that it was properly admitted, as discussed above. Kruger fails to explain how counsel could be deficient for not offering a limiting instruction regarding properly admitted, non-ER 404(b) evidence.

Further, even assuming this was ER 404(b) evidence, counsel could validly have determined that an instruction would only call attention to the negative impact of the evidence. Here, there was no evidence presented or argument made that Kruger had committed any wrongdoing during the prior

"experience" with law enforcement. To instruct the jury they should not consider the evidence for such a purpose could have been seen by counsel as an invitation to such speculation where none would have otherwise occurred.

Nor does Kruger establish prejudice. As previously discussed, *Kruger* is the party that introduced the evidence of prior experience with law enforcement. And as also discussed previously the erroneous admission of the evidence itself would have to be deemed harmless. It follows that for the same reasons, any failure to request a limiting instruction could not have affected the outcome of the trial, either.

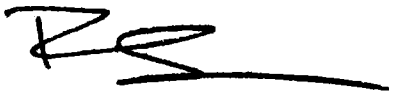
IV. CONCLUSION

For the foregoing reasons, Kruger's conviction and sentence should be affirmed.

DATED December 29, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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